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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN HERNALDO JIMENEZ,

Defendant and Appellant.

B207535

(Los Angeles County  
Super. Ct. No. NA069558)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Gary J. Ferrari, Judge. Affirmed.

Landra E. Rosenthal, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M.  
Roadarmel, Jr. and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and  
Respondent.

Jonathan Hernaldo Jimenez appeals from a judgment entered following a jury trial resulting in his conviction of first degree murder with a lying-in-wait special circumstance. He argues the trial court should have instructed the jury that, if the evidence showed he suffered from a hallucination, which contributed to the killing, that evidence was relevant to whether he killed with premeditation and deliberation. Jimenez also argues his sentence constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the federal Constitution. We find no error and affirm the judgment.

### **PROCEDURAL BACKGROUND**

At 1:15 a.m. March 18, 2006, Richard Heredia died from a stab wound inflicted the previous night. Jimenez was charged with Heredia's murder. It was alleged that the murder was committed with malice aforethought and that Jimenez personally used a deadly and dangerous weapon within the meaning of Penal Code section 12022, subdivision (b)(1).<sup>1</sup> The People also alleged that the murder was committed by lying in wait within the meaning of section 190.2, subdivision (a)(15), and that it was a serious felony within the meaning of section 1192.7, subdivision (c). Jimenez pled not guilty and was tried by a jury.<sup>2</sup>

During trial, Jimenez presented no evidence in his defense except pictures of Heredia's hands. A videotaped interview of Jimenez was played for the jury and, in it, Jimenez admitted that he stabbed Heredia. Jimenez's defense attorney requested the court instruct the jury with CALJIC No. 8.73.1, which provides: "A hallucination is a perception that has no objective reality. [¶] If the evidence

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<sup>1</sup> Undesignated statutory citations are to the Penal Code.

<sup>2</sup> Jimenez's trial attorney requested a two-week continuance to hire a psychiatrist and consider changing his client's plea to guilty by reason of insanity. That request was denied because Jimenez had been evaluated and determined not to be insane at the time of the crime.

establishes that the perpetrator of an unlawful killing suffered from a hallucination which contributed as a cause of the homicide, you should consider that evidence solely on the issue of whether the perpetrator killed with or without deliberation and premeditation.” The court was initially receptive to giving the instruction, but after further research and oral argument, declined to do so.

During closing argument, Jimenez’s counsel conceded that Jimenez was responsible for the killing, but argued that the jury should return a verdict of second degree murder because Jimenez thought that Heredia was going to attack him.

The jury found Jimenez guilty of first degree murder. It further found that Jimenez committed the murder by lying in wait within the meaning of section 190.2, subdivision (a)(15). It also found true the personal use enhancement pursuant to section 12022, subdivision (b)(1). The court sentenced Jimenez to life without the possibility of parole, plus one year for the personal use enhancement. Jimenez timely appealed.

### **FACTUAL BACKGROUND**

On March 17, 2006, Jimenez and Heredia were living in a home for men with substance abuse or other problems. They had worked together that day at an RV show. That evening, at a church conference, Jimenez won a shirt in a raffle and Heredia pulled the shirt out of Jimenez’s hand. Afterwards, Jimenez mentioned to another resident that Heredia “gets on his nerves.”

That night, after they returned from church, Jimenez wore his pajamas over his clothing and tennis shoes, rather than his usual slippers. Jimenez walked through the kitchen, unlocked and opened the rear door, and closed the curtains, all acts contrary to the rules or general conduct at the home. Jimenez had gloves from the yard and placed a bicycle next to the garage.

Once everyone had gone to bed, Jimenez stabbed Heredia multiple times with two knives he had retrieved from the kitchen. Immediately prior to the stabbing, Heredia had been sleeping.

After the killing, police found Jimenez in the apartment where his mother and stepfather lived. There was blood and vomit outside the apartment, and inside there was blood on a sweatshirt, on blinds, in the bathroom sink, and on the tank top Jimenez was wearing. The blood on the sweatshirt was determined to be Heredia's.

Detective Isidro Rodriguez interviewed Jimenez the morning after the killing. Initially, Jimenez claimed that a man wearing a bandana and carrying a shank entered the residence causing Jimenez to flee. Jimenez denied riding a bicycle. After further questioning, however, Jimenez admitted: "I went crazy." Jimenez said he hurt Heredia with two blades from the kitchen and did not stop until he heard someone awake. He admitted putting the knives from the kitchen under the bicycle and using gloves to avoid fingerprints. He put clothes under his pajamas and threw the gloves and pajamas on the road after he left the residence on the bicycle.

Jimenez explained: "I don't know what I was thinking and -- those things I had already dreamed and they are the things that I thought I had to do and I did do it. I have to have some consequences." "Everything was in my head. I already knew how I was going to do it, how it was done, I -- I knew since the day before what was going to happen that day. What they were doing, what I was doing, what they were going to do to me . . . and if I did not do it they were going to do it to me. And that is why I did that . . . ."

When asked if he planned the attack the day before, Jimenez responded, "[i]t was in my head, bro." When asked what that meant, Jimenez responded, "[i]t was a dream." He further explained: "It was exactly like what happened that day --

yesterday.” Jimenez stated that he picked Heredia because “today, it was going to be him, three of his other friends -- I know who they are. I know their faces. They were going to come, and it was going to be me right there.” Jimenez said Heredia’s friends “were going to get” him. When the detective tried to clarify, Jimenez stated: “it was a -- like this, the dream I had before is yesterday. . . . I had Richard by himself, so nothing would happen today, or if there -- I -- I went to sleep and wake up the next morning, and it happened like around 10:30 against me.” He had the bike ready, and when he reached his mother’s home, he told her to lie for him. He told her that “it was in my dreams and everything.” Jimenez had the same dream for a while.

Jimenez told Detective Rodriguez he used marijuana, methamphetamine, and cocaine and had used drugs daily for three or four years. At the time of the interview, however, Jimenez had not used drugs for a month. There was evidence that another resident at the men’s home told police that Jimenez had the mentality of a 12-year-old, and that Jimenez had tried to cut himself with a razor blade. Detective Rodriguez testified that paranoia can be a symptom of drug abuse, and that a person may have delusional thinking as a result of drug abuse.

## **DISCUSSION**

Jimenez argues (1) the failure to instruct the jury with CALJIC No. 8.73.1 requires the reversal of his conviction and (2) the special circumstance of lying in wait violates the Eighth and Fourteenth amendments to the federal Constitution.

### **1. *Jimenez Has Not Shown Instructional Error***

A trial court must instruct on a lesser included offense if there is evidence to support that theory. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The trial court correctly found no support for Jimenez’s theory that his dream as described in his interview with Detective Rodriguez could show the absence of premeditation and deliberation so as to support a conviction for second degree murder.

a. *There Was No Evidence Jimenez Had a Hallucination or a Delusion*

A hallucination is “a perception with no objective reality” or a “[p]erception of visual, auditory, tactile, olfactory, or gustatory experiences *without an external stimulus.*” (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678 (*Padilla*).) A delusion is “something that is falsely or delusively believed or propagated . . . as . . . a false conception and persistent belief unconquerable by reason in something that has no existence in fact [or] a false belief regarding the self or persons or objects outside the self that persists despite the facts . . . .” (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1453, fn. 22.)

Jimenez did not testify, and no psychologist testified that Jimenez suffered from hallucinations or delusions. Jimenez told Detective Rodriguez he had a dream, but Jimenez’s dream about Heredia attacking him does not show he perceived the events in his dream to be real. Even assuming a dream may cause a delusion as Jimenez argues, there is no evidence that is what occurred here. Although Detective Rodriguez testified a person may have delusional thinking as a result of drug abuse, there was no evidence Jimenez suffered from delusions, and, at the time of the killing, he had not used drugs for a month. Thus, Jimenez did not establish the threshold requirement for CALJIC No. 8.73.1, viz., that he suffered from a hallucination or delusion.

b. *Assuming Jimenez’s Dream Was a Hallucination, Any Instructional Error Was Harmless*

The presence of premeditation and deliberation distinguishes first degree murder from second degree murder. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) The jury was instructed “[m]urder of the second degree is the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove

deliberation and premeditation.” Jimenez’s argues that “there was sufficient evidence before the jury for the jury to conclude appellant acted on the basis of a hallucination, when, in the belief that Richard Heredia was going to attack him, he decided to prevent such an attack and did so by stabbing Heredia while he slept.”

In *Padilla, supra*, 103 Cal.App.4th 675, the genesis of CALJIC No. 8.73.1, the court held that a hallucination may be considered as evidence of provocation in determining whether a defendant committed a first or second degree murder. Padilla was charged with the murder of his cellmate. (*Id.* at p. 677.) During the guilt phase, the trial court rejected Padilla’s attempt to admit the testimony of two psychologists that the killing was retaliatory after Padilla hallucinated that his cellmate killed Padilla’s father and brothers. (*Ibid.*) One of the psychologists would have testified that Padilla hallucinated and the other would have testified about the concept of a hallucination as provocation. (*Id.* at p. 678.) The appellate court held that a subjective test applies to determine “whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder . . . .” (*Ibid.*) Finding the jury could have concluded Padilla’s hallucination provoked a heat of passion and reduced the murder from first degree to second degree, the court vacated the judgment of conviction on first degree murder. (*Id.* at pp. 678-679.)

In contrast to *Padilla*, even assuming Jimenez suffered from a hallucination, there was no testimony linking a hallucination to the legal concept of provocation. Jimenez’s statements about his dream demonstrated that the dream occurred the day before he engaged in the planning of the murder. Jimenez described wearing pajamas over his clothes, using gloves to prevent fingerprints, placing knives under the bicycle, and making sure that the bicycle was ready for his departure from the residence. There was also evidence that the night of the killing, Jimenez unlocked the door to the residence, closed the curtains, and waited until everyone was

sleeping before he stabbed Heredia. No evidence contradicted the extensive evidence of planning and no evidence showed that Jimenez acted in the heat of passion.

Unlike in *Padilla*, defense counsel was permitted to argue that there was no premeditation and deliberation because Jimenez was acting on a delusion. (See *Padilla, supra*, 103 Cal.App.4th at p. 679.) For example, counsel argued that “there can be no possible reason other than some kind of delusional thinking for this crime, had to be some kind of paranoia, some kind of delusions, dreams, vision . . . because there is no other reason to explain this, this homicide, this murder except that something happened in [Jimenez’s] mind.” Counsel also argued that Jimenez “really wasn’t able to weigh any considerations for and against because in his mind there were no considerations for and against, there was only one consideration, there was only one choice, there was only one option and that was to defend himself.”

In contrast to *Padilla*, the alleged error here was solely instructional. Jimenez was not precluded from presenting evidence or from arguing his theory of the case. Any error in failing to instruct fully on a lesser included offense is reviewed under the harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Breverman, supra*, 19 Cal.4th at pp. 176-178.) The evidence of premeditation and deliberation in this case was overwhelming, and there was no reasonable probability that the failure to instruct the jury with CALJIC No. 8.73.1 affected the verdict. (See *ibid.*)

c. *Because the Jury Found the Lying-In-Wait Special Circumstance True, Any Instructional Error Was Harmless as a Matter of Law*

Not only was any error harmless under *Watson*, but it was harmless as a matter of law because the jury found that Jimenez was guilty of the lying-in-wait special circumstance. To find the special circumstance true, the jury necessarily



found that there was (1) a concealment of purpose; (2) a substantial period of time of watching and waiting for an opportune time to act; and (3) immediately thereafter a surprise attack. (*People v. Michaels* (2002) 28 Cal.4th 486, 516.) The jury was instructed “[t]he term ‘lying in wait’ is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise.”

A showing of lying in wait obviates the need to prove premeditation and deliberation. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149, fn. 10.)<sup>3</sup> Here, the jury made a special finding that Jimenez committed the murder by lying in wait, within the meaning of section 190.2, subdivision (a)(15). Thus, Jimenez’s argument that the jury might have convicted him of only second degree murder is incorrect as a matter of law, because the jury found the functional equivalent of premeditation and deliberation.

2. *Jimenez Does Not Show His Sentence Violates the Eighth and Fourteenth Amendments to the Federal Constitution*

Jimenez argues that there is no meaningful basis to distinguish first degree murder based on lying in wait and the special circumstance based on lying in wait. He argues the imposition of the harsher sentence for the special circumstance violates the Eighth and Fourteenth Amendments to the federal Constitution because the lying-in-wait circumstance fails to narrow the class of persons who may be sentenced to death or life without the possibility of parole. This argument is based on the principle that state sentencing guidelines must distinguish between criminals sentenced to death and those not sentenced to death. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The principle does not extend to those

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<sup>3</sup> In another portion of his brief, Jimenez acknowledges that lying in wait is “‘the functional equivalent of proof of premeditation, deliberation and intent to kill.’”

sentenced to life without the possibility of parole. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995-996.)

Jimenez's argument is based on principles applicable to the death penalty. Because he was not sentenced to death, he lacks standing to raise this issue. (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906.) Moreover, even were we to consider Jimenez's argument on the merits, we would be required to reject it. Our Supreme Court rejected the identical argument in *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149, and we are required to follow its ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

#### **DISPOSITION**

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.